



U.S. Department of Justice

*United States Attorney
Southern District of New York*

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

April 2, 2018

By ECF and Email

Honorable Valerie E. Caproni
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

**Re: *United States v. Sheldon Silver,*
 S1 15 Cr. 93 (VEC)**

Dear Judge Caproni:

The Government respectfully writes to provide its supplemental requests to charge in advance of the retrial in the above-captioned matter, and to propose questions for the examination of prospective jurors.

Requests to Charge

The Government requests that, absent evidence or argument at the retrial warranting further changes or additions, the Court provide the same charge to the jury as it provided at the first trial, except to the extent that modifications may be warranted in light of *McDonnell v. United States*, 136 S. Ct. 2355 (2016). The Government requests the below modifications in light of *McDonnell*, which are taken from this Court's recent charge in *United States v. Percoco, et al.*, 16 Cr. 776 (VEC).

First, where the Court previously instructed the jury concerning the meaning of "official action" with respect to the public honest services fraud counts, starting on page 3098 of the trial transcript, the Government requests that the Court instruct the jury as follows:

I have mentioned "official action." The natural question then arises, what is "official action?" An "official act" or "official action" is a decision or action on a specific matter that may be pending or may by law be brought before a public official.

An official act must involve a decision, an action, or an agreement to make a decision or to take action. The decision or action may

Honorable Valerie E. Caproni
United States District Judge
April 2, 2018
Page 2

include using one's official position to exert pressure on or to order another to perform an official act. It may also include using one's official position to provide advice to another, knowing or intending that such advice will form the basis for an official act by another.

The decision or action must be made on a question or matter that involves a formal exercise of governmental power. That means that the question or matter must be specific, focused, and concrete—for example, the kind of thing that could be put on an agenda and then checked off as complete. It must be something that may by law be brought before a public official or may, at some time, be pending before a public official.

In order to be “official action,” the decision or action must be more than just setting up a meeting, consulting with an official, organizing an event, or expressing support for an idea. Without more, those activities do not constitute “official action.” That is not to say that sort of activity is not relevant. Such activity may be evidence of an agreement to take official action or of using one's official position to exert pressure on or to order another to take official action. Such activity could also be evidence of an agreement to provide advice to another, knowing or intending that such advice will form the basis for an official act by someone else. Standing alone, however, setting up a meeting, consulting with an official, organizing an event, or expressing support for an idea does not constitute “official action.”

The Government further requests that, as it did in the *Percoco* matter, the Court also refer to “official action” in its instructions concerning the extortion counts, and instruct the jury that the foregoing definition applies to those counts.

Second, the Governments requests that, as it did in the first trial and in the *Percoco* matter, the Court instruct the jury that the official action need not have yet occurred, nor need the recipient of payments (here, the defendant) have had a specific such action in mind, but rather it is sufficient if the pertinent payment is sought or obtained with respect to official action “as opportunities arose.”

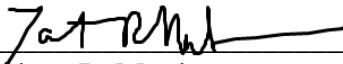
Honorable Valerie E. Caproni
United States District Judge
April 2, 2018
Page 2

Voir Dire

The Government requests that the Court ask the same *voir dire* questions as it did at the first trial.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

By: 

Tatiana R. Martins
Daniel C. Richenthal
Damian Williams
Assistant United States Attorneys
(212) 637-2215/2109/2298

cc: Counsel of Record (by ECF)